Gov. waives appn

(24)

SUPREME COURT OF THE UNITED STATES.

No. 1342

JOEL O. RANDALL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Fifth Circuit,

and

BRIEF AND ARGUMENT IN SUPPORT THEREOF.

G. ERNEST JONES,
Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
Birmingham, Alabama,
Of Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Textbooks Cited.

Statute Cited.

SUPREME COURT OF THE UNITED STATES.

No. .....

JOEL O. RANDALL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Fifth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Joel O. Randall, respectfully shows:

1. On August 26, 1944, the United States District Attorney for the District Court of the United States for the Middle District of Georgia, Columbus Division, filed an information containing three counts in said court and against this petitioner. Each of said three counts charged this defendant with wilfully and unlawfully having in his possession gasoline ration coupons not acquired by said defendant in accordance with provision of ration order

5C or any prior gasoline ration orders issued and effective pursuant to law (Rec. pp. 2-6). On the 4th day of September, 1944, your petitioner was arraigned and pleaded not guilty (Rec. p. 7) and the trial then proceeded and on the 6th day of September, 1944, the jury returned a verdict finding the defendant guilty on all three counts (Rec. p. 7), and thereupon the defendant suffered judgment and sentence fixing his punishment at imprisonment for a period of twelve months and imposing a fine in the sum of $5,000.00. This was within the maximum limit of punishment which might have been imposed upon one count of the information (Rec. pp. 7-8). The aforesaid judgment and commitment was entered on September 7, 1944, and the petitioner then immediately gave notice of appeal (Rec. p. 99) and the court fixed the amount of his bail at $5,000.00, which was immediately furnished and approved by the Clerk of the United States District Court (Rec. pp. 102-104). This appeal was submitted to the Circuit Court of Appeals for the Fifth Circuit and an opinion rendered on March 31, 1945, affirming the judgment of the court below. Timely application for a rehearing was filed and on May 4, 1945, the petition for rehearing was denied.

2. **Statement of Facts.** J. G. Newberry, Chief of Police of the City of Columbus, testified (Rec. pp. 29-36) that on the 21st day of May, 1944, he arrested the defendant. He testified that he and other police officers were looking for Barney Berry and were out on Talbotton Road when a car came by which they chased about a couple of miles and when this car drove into a drive the police officers ran up behind the car; that Barney Berry jumped out of that car on the right-hand side and Chief Adair jumped out of the car in which the officers were riding; that Chief Adair caught Barney Berry and took a gun off of him, an automatic; the witness, Newberry, ran around and ar-

rested Randall. This witness testified that Randall was under the wheel of the car in which Randall had been riding. The police officers found under the front seat of the car in which Randall had been riding the gasoline coupons which were introduced in evidence in this case. They were rolled up and in bags and pushed under the seat about middle way of the seat. There was no material difference in the testimony of this witness on cross-examination. He continued to insist that Randall was under the steering wheel of the automobile in which Randall was riding.

The next witness for the Government was H. M. Adair who was Chief of Detectives of the City of Columbus (Rec. pp. 36-48), whose testimony was the same in substance as that of Chief Newberry, yet, he contradicted Newberry in a most material matter, viz.: This witness said that Barney Berry was driving the automobile in which Berry and Randall were riding at the time and immediately before the arrest (Rec. p. 37).

The next witness for the Government, Arthur M. Schanz, Chief Clerk of the Hillsboro County War Price and Rationing Board (Rec. pp. 45-65). This witness testified that he had the original records of his office with him (Rec. p. 46); that he was the custodian of these records (Rec. p. 47); and that they had been in his custody all the time. He testified that the gasoline rationing tickets offered in evidence were the property of his Board and in his custody prior to May 21, 1944, over objection of defendant (Rec. p. 47). He testified that these tickets were not issued by the Ration Board at Tampa, Florida, to any person in accordance with Ration Order 5-C, over objection of defendant. In reply to a question propounded by the court, he stated that he did not have the record of all tickets that were issued to individuals by his Ration Board (Rec. p. 48), but stated that such records were kept (Rec. p. 48) and that he had examined those records to see

whether these tickets were included in those records (Rec. p. 49) and after examination he again was permitted by the court to testify that these tickets were not issued to any person by the Ration Board of Hillsboro County and testified that they were not issued to Joel Randall or Barney Berry (Rec. p. 49). Again, on page 51, he was permitted over objection of defendant to testify that by checking the numbers on the tickets offered in evidence against this defendant these tickets were not issued by his Ration Board to Joel Randall. He was again permitted over objection of defendant to testify that these tickets were not legally issued out of his custody and were never issued to the defendant (Rec. p. 52). He was again permitted to testify what his records showed with regard to these ration tickets (Rec. p. 53). He was again permitted to testify that these tickets were in his custody up until May 20, 1944, and again permitted to testify that these tickets had not been issued to any person (Rec. p. 55). He was also permitted to testify that the vault in which the Ration Board kept the tickets was broken and in going back to work the following Monday morning the vault was open and the tickets were not there; that the door had been sprung open (Rec. p. 55). He was again permitted to testify that these tickets were not issued to anyone (Rec. p. 57), and again permitted to testify that they were in his custody on May 20 and were not in his custody now (Rec. p. 58).

To each and every question in the foregoing testimony the defendant strenuously objected, assigning as grounds that the questions called for hearsay, irrelevant, illegal and incompetent testimony, secondary evidence, and that no proper predicate had been laid for the introduction of such testimony. On cross-examination this witness was asked to produce the documents to which he had referred as records of the Hillsboro County Ration Board and they

were offered in evidence and identified as Exhibits A, B, and C (Rec. p. 59), D, E, F, and G, and each of these exhibits were offered in evidence by the defendant. The witness testified that these were the only records brought by him from the Hillsboro Ration Board and the only records which he had in court at the time (Rec. p. 61). He testified that the Hillsboro Ration Board did keep original records showing the issuance of the coupons (Rec. p. 61). He had before him at the time a memorandum which he had made by himself, which memorandum was made on the 20th day of July, 1944, and admitted that he was testifying from this memorandum. He said that the Board did keep a complete record day by day of coupons leaving the Board lawfully and that these records were in the Tampa Board and were not in court or in Columbus; that he did not bring them with him (Rec. p. 62). He testified that he did not have personal present knowledge with regard to the facts as to what coupons were issued by or out of his Board during the spring (Rec. pp. 62-63). He stated that he had no independent recollection of the facts with regard to which he was testifying, stating:

> "It would be impossible for me to tell you of the number of coupons that were issued lawfully from our Board. We issue for all of Hillsboro County and it would be just impossible for me to carry those records in my head and it would be impossible for me to carry all of those records with me" (Rec. p. 63).

He further testified that he did not have any of the original records in court in order that the defendant might examine them and see whether or not his memorandum was correct (Rec. p. 63).

Upon this statement of the witness the defendant moved the court to exclude the testimony of this witness with regard to the failure of the Ration Board at Tampa to issue these coupons on the ground that his testimony was

hearsay testimony; that he had not brought the original records showing the issuance of coupons; that the defendant had no opportunity to examine the original record, to test it for correctness or to cross-examine as to whether his memorandum that he made and brought to court to testify from was correct or not (Rec. p. 63).

The court overruled this objection and the defendant was given an exception (Rec. p. 64).

In Chambers the defendant again renewed his motion to exclude the testimony of the Clerk of the Ration Board at Tampa, Florida, on the ground that his testimony was hearsay and the witness admitted that he had no personal knowledge independent of his record with regard to the particular issuance of coupons, which motion was overruled and exception duly reserved (Rec. pp. 67-68).

At the close of the entire case, the defendant in Chambers, through his attorney, again moved the court to exclude the testimony of the Clerk of the Ration Board of Tampa, Florida, on the ground that his testimony was hearsay; was not the best evidence; and that the records of the Board would have been the best evidence; and on the ground that the witness admitted that he had no personal knowledge independent of the record with regard to the issuance of the coupons, which motion was overruled and exception duly taken (Rec. pp. 84-85). The defendant also moved the court again for a directed verdict in favor of the defendant, which motion was overruled and exception duly taken (Rec. p. 86).

JURISDICTION.

It is contended that the United States Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals here sought to be reviewed under Section 347 (a) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

It is contended by the petitioner:

1. That where proof is to be made of a fact and is recorded in writing, the best evidence of the contents of the writing consists in the actual production of the document itself.

2. That secondary evidence will not be received as proof where no production of the writing is not properly accounted for.

3. That the Government did not comply with the proper conditions to bring the testimony of the Chief Clerk of the Ration Board within any known exception to the best evidence rules; that the books or records from which he obtained his information were not shown to be too voluminous nor did he purport to show a complete summary of the information which they contained nor were they made available to the defendant for purposes of cross-examination nor were their competency established.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The judgment of the Court of Appeals involves fundamental questions of evidence which have never been directly passed upon by the Supreme Court of the United States and should be settled by it.

2. The decision here sought to be reviewed is contrary to the fundamental concept of justice which requires that there must be legal evidence upon which to support a conviction before a man may be punished.

3. The judgment and decision of the Circuit Court of Appeals here sought to be reviewed is in conflict with

prior decisions and judgments of the Supreme Court of the United States particularly the cases of

Clifton v. U. S., 4 Howard (U. S.) 242, 11 Law Ed. 957;
Probst v. Board of Domestic Missions, 129 U. S. 182, 32 Law Ed. 642, 9 S. Ct. 263;
Dwyer v. Dunbar, 5 Wall. (U. S.) 318, 18 Law Ed. 489;
U. S. v. Castro, 24 Howard (U. S.) 346, 16 Law Ed. 659;
U. S. v. Boyd, 5th Howard (U. S.), 12 Law Ed. 36;
U. S. v. Wood, 14 Pet. (U. S.) 430, 10 Law Ed. 36.

INJURY.

This petitioner says that he has suffered grievous injury in that he has been convicted without substantial legal evidence to support said conviction and that upon a trial upon legal testimony your petitioner confidently relies upon an acquittal.

And your petitioner herewith presents as a part of this petition transcript of the record in the Circuit Court of Appeals for the Fifth Circuit. And your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its Docket No. 11,152, Joel O. Randall, appellant, v. United States of America, appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this court, and that your petitioner be discharged without day and have

such other and further relief in the premises as this Honorable Court may deem just and proper.

.....

G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
Birmingham, Alabama,
Of Counsel for Petitioner.

I, G. Ernest Jones, counsel of record for the petitioner in the above styled petition, do hereby certify that the above and foregoing petition for writ of certiorari is filed in good faith, believing the same to be meritorious.

.....

G. Ernest Jones,
Of Birmingham, Alabama,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

PROPOSITION OF LAW I.

Where proof is to be made of a fact and is recorded in writing, the best evidence of the contents of the writing consists in the actual production of the document itself.

Clifton v. U. S., 4 Howard (U. S.) 242, 11 Law Ed. 957;
Dunn v. State, 2 Ark. 229, 35 Amer. Decisions 54;
State v. DeWolf, 8 Conn. 93, 20 Amer. Decisions 90.

PROPOSITION OF LAW II.

Secondary evidence will be received as proof only where nonproduction of the writing is properly accounted for.

Probst v. Board of Domestic Missions, 129 U. S. 182, 32 Law Ed. 642, 9 S. Ct. 263;
Dwyer v. Dunbar, 5 Wall. (U. S.) 318, 18 Law Ed. 489;
U. S. v. Castro, 24 Howard (U. S.) 346, 16 Law Ed. 659;
U. S. v. Boyd, 5th Howard (U. S.), 12 Law Ed. 36;
U. S. v. Wood, 14 Pet. (U. S.) 430, 10 Law Ed. 527;
Hammett v. State, 84 Tex. Crim. Reports 635, 209 S. W. 661, 4 A. L. R. 347;
20 Amer. Juris. 366-367.

PROPOSITION OF LAW III.

The Government did not comply with the proper conditions to bring the testimony of the chief clerk of the Ration Board within any known exception to the best evidence rules; the books or records from which he obtained his information were not shown to be too voluminous nor did he purport to show a complete summary of the information which they contained, nor were they

made available to the defendant for purposes of cross-examination, nor were their competency established.

Edelen v. Muir, 163 Ky. 685, 174 S. W. 474, 71 Neb. 657, 99 N. W. 493;
In re Coyle, 201 Ill. App. 1;
Bartlett v. Wheeler, 195 Ill. 445, 63 N. E. 169;
Wilson v. Wilson, 16 Fed. 2nd 177, 52 A. L. R. ...;
Rouw v. Arts, 52 A. L. R. 1263.

ARGUMENT.

It is respectfully submitted to the Supreme Court that many objections to the testimony of A. M. Schanz made in the trial of the defendant were erroneously overruled by the court below, that these rulings constituted prejudicial error to the great injury of the appellant and that the Circuit Court of Appeals for the Fifth Circuit erred in holding that no prejudicial error was committed by the court below in this respect.

We have set out the facts of this case at some length in our petition for writ of certiorari. We desire at this point to quote from the record certain particular questions and answers which we contend are typical of error of the court below throughout the trial.

> "Q. All right, I will ask you this: Do you have personal present knowledge with regard to the facts as to what coupons were issued by or out of your Board during the Spring, the numbers, etc.?
>
> "A. No, sir; I do not have that complete record with me, nor could I quote it from memory.
>
> "Q. And you have no personal knowledge of the facts which you have testified to here this morning, except as your recollection of the records?
>
> "A. Yes.
>
> "Q. And the testimony that you have given here this morning is intended to be a statement by you as to what the records show, is that correct, and not a statement of personal knowledge on your own part?
>
> "A. It would be impossible for me to tell you of the number of coupons that were issued lawfully from our Board. We issue for all of Hillsborough County and it would be just impossible for me to carry those records in my head and it would be impossible for me to carry all of those records with me.
>
> "Q. And you do not have the original record here

in order that the defendant may examine it and see whether or not your audit is correct?

"A. I do not have a record of any of the ones that were issued; no, sir" (Rec. pp. 62-63).

It is further to be observed that the witness, Schanz, testified unequivocally that he made the examination of the books and records and made the memorandum which he used to refresh his recollection on the 20th day of July, 1944, which was exactly two months after the transaction subject to inquiry and with regard to which he was testifying (Rec. p. 62).

It is also to be observed that he based his statement in evidence to the effect that the coupons in question had been in the custody of his Board upon the fact that he had carbon copies of requisitions which his Board had made ordering the coupons to be shipped out to his Board. He produced no record evidencing the receipt by the Tampa Board of these coupons (Rec. pp. 59-61).

It is respectfully submitted that the cases upon which the Circuit Court of Appeals relies for its holding in this particular are not in point.

True, without careful examination, the case of Girson v. U. S., 56 Fed. (2) 358, is apparently in point. But a careful reading of this case shows that the issue made by the plaintiff and defendant was entirely different from the issue made in this case and it furthermore appears that the testimony was of a collateral nature, in which event, it is a well recognized principle of law, the best evidence rule does not prevail.

The case of Shore v. U. S., 56 Fed. (2) 490, 491, is not in point. The issue of fact there was as to whether or not there had been an importation of foreign liquors. Of course, if there had been no liquors received, then there would be no books of account with regard to such liquors involved and the witness can testify that there were no

such receipts of foreign liquors. The exact reverse appears in our case. The Government sought to prove the receipt of coupons in great magnitude. It was necessary to the Government to show that the Tampa Board had custody of these particular coupons in the first instance. This was **affirmative** testimony, and the witness having no personal knowledge but basing his sworn testimony purely upon his recollection as to what the books showed, the appellant would have a right to examine those books to see if the coupons **had ever actually been received in the Board**, and if so received, check the records of issuance, see whether or not they were kept regularly and accurately and whether or not they reflected a transfer of these coupons from this Board to any other agency of the Government, or showed the issuance of these coupons to any user of gasoline. This again was affirmative testimony. It was an accounting problem and necessarily involved a full and complete examination of the books.

The case of Wilson v. Wood, 127 Georgia 316, 319, is not in point. Of course, if there has been no administration of an estate any person who has knowledge of that fact may so testify. The ruling in the Wilson v. Wood case, supra, is based upon:

> "The reason for its exclusion from this general rule rests upon the principle that the production of a record is not required to prove what it does not contain."
>
> Wilson v. Wood, supra.

It affirmatively appears in the record of our case from the testimony of the witness, Schanz, that the accounting system of the Ration Board, of which he was chief clerk, did contain records by a card index system showing the quantity of coupons received and the quantity of coupons issued—such records constituting a complete accounting

system comparable to a ledger account of debits and credits in a bank or mercantile establishment. Since the books did contain this record, the appellant had a right to check that accounting record to determine its accuracy and completeness and reliability.

We also direct the attention of the Supreme Court to the fact that each of the foregoing cases are decisions by secondary courts and, of course, do not rank in their persuasive authority with decisions rendered by the Supreme Court of the United States. The Circuit Court of Appeals did not, in the opinion rendered, give consideration to the authorities cited in support of Propositions of Law I, II, and III, in our original brief and argument filed on submission in this case, and which are hereinbefore cited in support of our Propositions I, II and III, in support of this brief. The authorities upon which we rely are almost entirely decisions of the Supreme Court of the United States and we respectfully urge upon the Supreme Court a full and complete consideration of those authorities.

To avoid extending this brief to undue lengths, we abstain from quoting at length from those authorities, in the opinion that the Supreme Court will prefer to read them in their entirety. We also urge upon the Supreme Court a full and complete consideration of the annotation appearing in 52 American Law Reports at page 1266 et seq.

To emphasize our position that the testimony of Schanz was **affirmative** and not merely **negative** testimony, we direct the court's attention to the fact that he testified that the particular coupons exhibited in evidence had been in his custody (Rec. p. 52) and he testified affirmatively that the numbers of the coupons which were in his custody were 9090129 to 9100000 (Rec. p. 53) and testified likewise to each of the other coupons. He testified that these coupons were in his custody up until May 20, 1944

(Rec. p. 54), and the same with reference to the other batches of ration tickets which were exhibited to him.

It further appears that the Government sought to justify the testimony of this witness as negative testimony by showing that the witness had examined the records to see if these coupons were issued to these two men. But the Government did not go further and show that these coupons had not been transferred from this Board to some other agency of the Government.

If any part of the testimony of this witness, Schanz, was illegally received over timely objection, this case must be reversed. We submit this brief on application for writ of certiorari confident that the Supreme Court will grant the writ of certiorari and upon final review will reverse the judgment of the Court of Appeals and the judgment of the court below and render this cause in favor of this petitioner or at least remand it to the United States District Court for trial upon legal testimony.

Respectfully submitted,

.....

G. ERNEST JONES,
Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
Birmingham, Alabama,
Of Counsel for Petitioner.